

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

SPRINT SPECTRUM, L.P.,

Plaintiff,

v.

BRIAN MOLINE, et al.,

Defendants.

CIVIL ACTION

No. 07-2130-KHV

ORDER

Sprint Spectrum, L.P. brings suit against Brian Moline, Robert Krehbiel and Michael Moffet in their official capacities as the Commissioners of the Kansas Corporation Commission ("KCC"). Plaintiff claims that by requiring it to offer a so-called "Lifeline" discount on all calling plans, defendants are requiring it to violate federal law. This matter is before the Court on Sprint Spectrum, L.P.'s Motion For A Temporary Restraining Order And/Or Preliminary Injunction (Doc. #4) filed March 23, 2007. On March 27, 2007, the Court heard oral argument on plaintiff's motion for a temporary restraining order.¹ For reasons stated below, the Court overrules plaintiff's motion.

I. Temporary Restraining Order Standards

A temporary restraining order is a drastic and extraordinary remedy, and courts do not grant it as a matter of right. See Paul's Beauty Coll. v. United States, 885 F. Supp. 1468, 1471 (D. Kan. 1995); 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 2948, at 128-29 & nn.3, 6-7 (2d ed. 1995). A temporary restraining order preserves the status quo and prevents immediate and irreparable harm until the Court has an opportunity to pass upon the

¹ At the hearing, counsel clarified that plaintiff seeks only a temporary restraining order at this time.

merits of a demand for preliminary injunction. See Flying Cross Check, LLC v. Cent. Hockey League, 153 F. Supp.2d 1253, 1258 (D. Kan. 2001). To obtain such relief, plaintiff must establish that (1) it has a substantial likelihood of prevailing on the merits; (2) it will suffer irreparable injury unless the temporary restraining order issues; (3) the threatened injury outweighs whatever damage the proposed restraining order may cause defendants; and (4) the temporary restraining order, if issued, will not be adverse to the public interest. See Tri-State Generation & Transmission Ass'n. v. Shoshone River Power, Inc., 805 F.2d 351, 355 (10th Cir. 1986). If the latter three requirements tip strongly in plaintiff's favor, the Tenth Circuit applies a modified test and plaintiff may meet the requirements for showing success on the merits by showing that "questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." Davis v. Mineta, 302 F.3d 1104, 1111 (10th Cir. 2002) (quoting Fed. Lands Legal Consortium ex rel. Robart Estate v. United States, 195 F.3d 1190, 1194-95 (10th Cir. 1999)). The modified standard, however, does not apply to three types of disfavored preliminary injunctions: (1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions which afford all the relief which movants could obtain after a full trial on the merits. See O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 389 F.3d 973, 977 (10th Cir.), cert. granted, 544 U.S. 973 (2005). Such disfavored injunctions "must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course." Id. at 975.²

II. Background Information

² In this case, the Court need not address what standard applies because plaintiff is not entitled to relief under the lower, modified standard which applies to injunctions which are not disfavored.

The Telecommunications Act of 1996 amended the Communications Act of 1934 (the “Act”), 47 U.S.C. § 151 et seq., to establish a federal program to create “universal support,” i.e. to make affordable telecommunications services available to all Americans. See 47 U.S.C. §§ 214, 254. To accomplish this goal, Congress directed the Federal Communications Commission (“FCC”) to establish a mechanism – funded by contributions from interstate telecommunications carriers – to provide financial support to “eligible telecommunications carriers” (“ETCs”). See 47 U.S.C. § 214(e). Under the Act, a State commission – here the KCC – has authority to designate carriers as ETCs. See id. In 2000, the KCC designated plaintiff an ETC for a defined geographic service area within the State of Kansas.

The FCC regulations regarding universal service are set forth at Title 47, Part 54 of the Code of Federal Regulations, 47 C.F.R. § 54.1 et seq. Sections 54.400 to 54.417 govern the so-called “Lifeline” support program to qualifying low income consumers.³ Section 54.403 sets forth provisions regarding the amount of support.⁴ It states that “eligible telecommunications carriers shall apply the [Lifeline support] to reduce their lowest tariffed (or otherwise generally available) residential rate for the services enumerated in Sec. 54.101(a)(1) through (a)(9), and charge Lifeline

³ According to plaintiff, a consumer in Kansas is eligible to receive federal Lifeline assistance if the applicant’s total household income is at or below 150 per cent of the federal poverty guidelines or the applicant participates in any of the following public assistance programs: Medicaid, Food Stamps, Supplemental Security Income, General Assistance, Temporary Assistance for Needy Families or the National School Free Lunch program. See Sprint Spectrum, L.P.’s Memorandum Of Law In Support Of Its Motion For A Temporary Restraining Order And/Or Preliminary Injunction (“Plaintiff’s Memorandum”) (Doc. #5) filed March 23, 2007 at 4-5.

⁴ The regulation provides different amounts of support depending on whether the consumer is an eligible resident of Tribal lands. See 47 C.F.R. § 54.403. According to plaintiff’s brief, it appears that the amount of federal Lifeline support for non-Tribal residents is \$13.50 per month. See Plaintiff’s Memorandum (Doc. #5) at 8.

consumers the resulting amount.” 47 C.F.R. § 54.403(b). According to plaintiff, this provision only allows it to apply the Lifeline discount to its lowest cost residential plan.⁵

Section 44.407 governs reimbursement for the Lifeline discount. This regulation provides that ETCs shall be reimbursed for the federal support amount, not to exceed the carrier’s standard non-Lifeline rate. See 47 C.F.R. § 44.407(b). To receive reimbursement, an ETC must keep accurate records of the revenues it forgoes in providing the Lifeline discount. See 47 C.F.R. § 44.407(c).

Section 254(f) of the Act provides that a State may adopt additional regulations to provide additional definitions and standards to preserve and advance universal service within that State, provided that (1) the additional regulations are not inconsistent with FCC universal service rules; and (2) the state regulations “adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.” 47 U.S.C. § 254(f).

On October 2, 2006, the KCC issued an order which requires ETCs to offer the Lifeline discount on all wireless calling plans. See Order Adopting Requirements For Designation Of Eligible Telecommunications Carriers at 38-41, Exhibit 1 to Plaintiff’s Memorandum (Doc. #5). Plaintiff requested reconsideration of the order, arguing that Section 54.403(b) requires it to apply the Lifeline discount to only its lowest tariffed rate or – because it does not have tariffed rates – its lowest generally available rate. See Order Addressing Petitions For Reconsideration at 14, Exhibit

⁵ Currently, plaintiff’s lowest cost plan is \$29.99 per month for 200 anytime minutes and unlimited night and weekend minutes. After applying the federal Lifeline discount of \$13.50, Lifeline customers pay \$16.49 per month for the service. See Plaintiff’s Memorandum (Doc. #5) at 8.

2 to Plaintiff's Memorandum (Doc. #5). The KCC disagreed, finding that the language in Section 54.403(b) indicates that Lifeline support may be applied to plans other than the lowest tariffed rate. See id. The KCC further found that even if plaintiff's interpretation is correct, the FCC regulation does not preclude the KCC from expanding the requirement. See id. at 15.

III. Analysis

Plaintiff asserts that by requiring it to apply the Lifeline discount to all calling plans, the KCC is compelling it to violate federal law. Specifically, plaintiff contends that 47 C.F.R. § 54.403(b) only allows it to apply the Lifeline discount to its lowest cost residential plan. Plaintiff therefore asks the Court to restrain defendants from requiring it to offer the Lifeline discount on all calling plans. To obtain such relief, plaintiff must establish that (1) it has a substantial likelihood of prevailing on the merits; (2) it will suffer irreparable injury unless the temporary restraining order issues; (3) the threatened injury outweighs whatever damage the proposed restraining order may cause defendants; and (4) the temporary restraining order, if issued, will not be adverse to the public interest. See Tri-State Generation, 805 F.2d at 355.

A. Substantial Likelihood Of Prevailing On The Merits

To prevail, plaintiff must show a substantial likelihood that the KCC requirement that it apply the Lifeline discount to all calling plans violates federal law. On this record, plaintiff has not done so.⁶ Plaintiff's argument boils down to its own interpretation of 47 C.F.R. § 54.403(b). The regulation states that "eligible telecommunications carriers shall apply the [Lifeline support] to

⁶ Because the next three requirements do not tip strongly in plaintiff's favor, the Court does not apply the modified standard for preliminary injunctions. Even under the modified test, however, the Court would find that plaintiff has not met the requirements for showing success on the merits.

reduce their lowest tariffed (or otherwise generally available) residential rate.” 47 C.F.R. § 54.403(b). Plaintiff argues that the parenthetical language “or otherwise generally available” applies when a carrier does not offer tariffed rates. Under plaintiff’s reading, a carrier which offers tariffed rates must offer the Lifeline discount on its lowest tariffed rate and a carrier which does not offer tariffed rates must offer the Lifeline discount on its lowest generally available rate. The KCC, on other hand, construes the regulation differently. Under the KCC’s reading, the parenthetical language “or otherwise generally available” demonstrates that the FCC intended carriers to apply the Lifeline discount to plans other than the lowest tariffed rate. The issue boils down to whether “lowest” refers only to “tariffed” rates or to both “tariffed” and “otherwise generally available” rates. Both interpretations are grammatically plausible, and plaintiff cites no authority that its interpretation is the correct one.

Moreover, the KCC determined that even if plaintiff’s interpretation is correct, FCC regulations do not preclude the KCC from imposing a higher requirement, *i.e.* requiring carriers to offer the Lifeline discount on plans other than their lowest tariffed rates or their lowest generally available rates. This interpretation appears to be reasonable in light of Section 254(f) of the Act, which authorizes a State to adopt additional regulations to preserve and advance universal service within that State. See 47 U.S.C. § 254(f). On this record, plaintiff has not shown a substantial likelihood that it will succeed on the merits of its claim.

B. Irreparable Injury To Plaintiff

Plaintiff asserts that it will suffer irreparable injury because to comply with the KCC requirement, it must violate federal law. As discussed above, plaintiff has not shown a substantial likelihood that it will prevail on this claim.

Plaintiff also asserts that it will suffer monetary damage because it cannot recover reimbursement for Lifeline discounts applied to higher-priced plans. Plaintiff, however, provides nothing more than its own speculation that the FCC will deny reimbursement. The FCC regulation regarding reimbursement says nothing which appears to preclude reimbursement for Lifeline discounts on higher-cost plans. See 47 C.F.R. § 54.407. Moreover, according to the KCC, other ETCs in Kansas have offered the Lifeline discount on all plans and received reimbursement thereon. On this record, plaintiff has not shown that it will suffer irreparable injury without a temporary restraining order.

C. Whether Threatened Injury Outweighs Damage To Defendants

As discussed above, plaintiff has not shown that it will suffer irreparable injury. On the other hand, a temporary restraining order would hinder defendants' efforts to adopt requirements to advance universal service within the State of Kansas. Plaintiff has not shown that any threatened injury outweighs such damage to defendants.

D. Public Interest

Plaintiff contends that a temporary restraining order is necessary to prevent customer confusion in the marketplace. Specifically, plaintiff contends that if it advertises and applies the Lifeline discount to all calling plans and later changes its position, customers will be confused and may have to reimburse plaintiff for discounts which they wrongfully received. On this record, plaintiff has not shown that this potential for customer confusion outweighs the public's interest in allowing the KCC to implement its rules to advance universal service within the State of Kansas. This is particularly true because so few Kansans utilize the Lifeline discount program and the record contains no evidence that any appreciable number of them will migrate to higher-cost plans, that the

FCC will deny reimbursement for such customers, or that customers will be confused or unwilling to reimburse plaintiff for any disallowed discounts. Furthermore, the record contains no credible basis for believing that plaintiff's compliance with the KCC order will subject it to criminal prosecution or civil litigation.

IT IS THEREFORE ORDERED that Sprint Spectrum, L.P.'s Motion For A Temporary Restraining Order And/Or Preliminary Injunction (Doc. #4) filed March 23, 2007 be and hereby is **OVERRULED.**

Dated this 6th day of April, 2007 at Kansas City, Kansas.

s/ Kathryn H. Vratil
KATHRYN H. VRATIL
United States District Judge